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No. 365. MISCELLANEOUS

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

EL PASO NATURAL GAS COMPANY and
PACIFIC NORTHWEST PIPELINE CORPORATION,

Petitioners,

—against—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH, CENTRAL DIVISION, AND MOTION FOR LEAVE TO FILE

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. ..... MISCELLANEOUS

EL PASO NATURAL GAS COMPANY and PACIFIC NORTHWEST PIPELINE CORPORATION,

Petitioners,

against

UNITED STATES OF AMERICA,

Respondent.

MOTION FOR LEAVE TO FILE PETITION FOR A WRIT OF CERTIORARI

Petitioners El Paso Natural Gas Company and Pacific Northwest Pipeline Corporation respectfully move this Court for leave to file the annexed petition for a writ of certiorari under the All Writs Act, 28 U. S. C. § 1651(a), directed to the District Court of the United States for the District of Utah, Central Division, to review an order of that Court (District Judge WILLIS W. RITTER) entered on October 21, 1957, denying in all respects petitioners' motion

> (1) for an order under Rule 12 of the Rules of Civil Procedure dismissing the complaint (a) for lack of jurisdiction over the subject matter of this action and (b) for failure to state a claim on which relief can be granted; or, in the alternative,
>
> (2) for an order staying all proceedings in this action until the final determination of each of the two proceedings presently pending before the Federal Power Commission in Commission Docket Nos. G-13018 and G-13019, which proceedings embrace the

matters set forth in the complaint, and until the plaintiff has exhausted all administrative remedies;

and petitioners move this Court for such other and further relief as may be just and proper.

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November 26, 1957

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. ..... MISCELLANEOUS

EL PASO NATURAL GAS COMPANY and PACIFIC NORTHWEST PIPELINE CORPORATION,
Petitioners,
against
UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

The petitioners respectfully pray that a writ of certiorari issue to review an order, entered on October 21, 1957, by District Judge WILLIS W. RITTER, denying in all respects petitioners' motion

> (1) for an order under Rule 12 of the Rules of Civil Procedure dismissing the complaint (a) for lack of jurisdiction over the subject matter of this action and (b) for failure to state a claim on which relief can be granted; or, in the alternative,
>
> (2) for an order staying all proceedings in this action until the final determination of each of the two proceedings presently pending before the Federal Power Commission in Commission Docket Nos. G-13018 and G-13019, which proceedings embrace the matters set forth in the complaint, and until the plaintiff has exhausted all administrative remedies.

The order for which petitioners seek immediate review is printed in Appendix A to this petition (*infra*, p. A-1).*

A certified transcript of the record in the District Court is furnished with this petition, in accordance with Rule 31, paragraph 2, of the Rules of this Court.

No Opinion Below

No opinion was rendered by the District Court in denying petitioners' motion.

The District Court denied petitioners' motion from the bench and orally explained the decision in the course of colloquy with counsel as reported in the official transcript of the proceedings of October 21, 1957, at pages 87 to 92. A copy of this portion of the official transcript of the proceedings is printed in Appendix A to this petition (*infra*, pp. A-2—A-5).

Jurisdiction

The jurisdiction of this Court is invoked under the All Writs Act, 62 STAT. 944, as amended, 28 U. S. C. § 1651(a) (formerly Section 262 of the Judicial Code, 28 U. S. C. § 377).

The United States claimed to institute this action under Section 15 of the Clayton Act (38 STAT. 736, 15 U. S. C. § 25) for an alleged violation of Section 7 of that Act (38 STAT. 731, as amended, 15 U. S. C. § 18).

Section 2 of the Expediting Act (32 STAT. 823, as amended, 15 U. S. C. § 29) confers upon this Court exclusive appellate jurisdiction of civil suits brought by the United States under the antitrust laws. *United Shoe Machinery Corporation* v. *United States*, 258 U. S. 451, 454; *Columbia Gas & Electric Corp.* v. *American Fuel & Power*

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* References to Appendix A are indicated thus: "(*infra*, p. A-)".

Co., 322 U. S. 379, 381; *United States Alkali Export Association, Inc.* v. *United States*, 325 U. S. 196, 202.

The following decisions sustain the power and jurisdiction of this Court to review the order of the District Court denying petitioners' motion: *United States Alkali Export Association, Inc.* v. *United States*, 325 U. S. 196, 202; *Far East Conference* v. *United States*, 342 U. S. 570, 572.

The Question Presented

May a District Court continue with the proceedings in an action under Section 7 of the Clayton Act and properly determine whether a natural gas pipeline company should be required to divest itself of its stock control of a second natural gas pipeline company even though the two pipeline companies after the action under Section 7 of the Clayton Act was instituted placed before the Federal Power Commission, pursuant to Section 7 of the Natural Gas Act, the question whether the first company's acquisition by merger of the pipeline facilities of the second company is required by the present or future public convenience and necessity?

Statutes Involved

The pending proceedings before the Federal Power Commission were instituted on August 7, 1957, under Section 7 of the Natural Gas Act, 52 STAT. 824, as amended, 15 U. S. C. § 717f.

The complaint in this action, filed on July 22, 1957, alleges that it is brought by the United States under Section 15 of the Clayton Act, 38 STAT. 736, 15 U. S. C. § 25, for an alleged violation of Section 7 of that Act, 38 STAT. 731, as amended, 15 U. S. C. § 18.

The effect upon the application of Section 7 of the Clayton Act of Federal Power Commission approval of a transaction is governed by the last paragraph of that Section, which provides that nothing contained in Section

7 of the Clayton Act shall apply to transactions duly consummated pursuant to authority given by the Federal Power Commission under any statutory provision vesting such power in the Commission.

The relevant provisions of the foregoing statutes are printed in Appendix B to this petition (*infra*, pp. B-1—B-4).

Statement of the Case

A. *The District Court action.*

This action complains that the acquisition by petitioner El Paso Natural Gas Company (hereafter "El Paso") of over 99% of the common stock of petitioner Pacific Northwest Pipeline Corporation (hereafter "Pacific Northwest") violates Section 7 of the Clayton Act because the effect of the acquisition may be substantially to lessen competition or to tend to create a monopoly.

The complaint asks that El Paso be required to divest itself of the stock of Pacific Northwest.

B. *The acquisition.*

El Paso and Pacific Northwest are each a regulated "natural gas company" within the meaning of Section 2(6) of the Natural Gas Act (52 STAT. 822; 15 U. S. C. § 717a), each operating a natural gas pipeline system pursuant to Federal Power Commission certificates of public convenience and necessity.

El Paso carries gas from fields in Texas, New Mexico and Colorado to customers in West Texas, New Mexico, Arizona and to a delivery point on the California-Arizona border from which it is distributed by local utilities in southern and central California. Pacific Northwest carries gas from Canada and from Colorado and New Mexico to customers in Washington, Oregon, Idaho, Wyoming, Utah and Colorado.

Between January 8, 1957, and May 1, 1957, El Paso acquired over 99% of the outstanding common stock of Pacific Northwest by offering El Paso shares in exchange.

In the offer to Pacific Northwest stockholders it was stated that a merger of the two companies was not then intended.

This acquisition by El Paso of the stock of Pacific Northwest was not subject to the jurisdiction of the Federal Power Commission under the Natural Gas Act. However, under Section 7 of the Natural Gas Act no natural gas company can acquire pipeline facilities without obtaining a certificate of public convenience and necessity from the Federal Power Commission and, accordingly, El Paso could not acquire the assets of Pacific Northwest, consisting in large part of pipeline facilities, without such a certificate.

On July 16, 1957, after the Department of Justice advised that it planned to file the present action, the board of directors of El Paso and the board of directors of Pacific Northwest authorized the merger of Pacific Northwest into El Paso pursuant to Section 253 of the Delaware Corporation Law and directed the filing of applications with the Federal Power Commission, pursuant to Section 7 of the Natural Gas Act, for certificates of public convenience and necessity permitting and approving El Paso's acquisition by merger of the pipeline facilities of Pacific Northwest. The Department of Justice was so advised.

C. *The proceedings before the Federal Power Commission.*

On August 7, 1957, El Paso and Pacific Northwest filed companion applications with the Federal Power Commission under Section 7 of the Natural Gas Act. El Paso asked authority under Section 7(c) to acquire by merger the pipeline facilities of Pacific Northwest. Pacific Northwest asked authority under Section 7(b) to abandon its pipeline facilities in favor of El Paso.

The applications set forth the grounds of public convenience and necessity on which petitioners base their request that the Commission approve the acquisition by merger of the pipeline facilities.

These grounds, which petitioners contend demonstrate the public interest in having one integrated pipeline system in lieu of two separate and independent systems, include the claims that through the unified control and integration of the two pipeline systems gas will be more economically transported with resulting lower cost to the customer, that more efficient utilization will be made of residue gas (a by-product of crude oil production), that the life index of the gas reserves of the two companies will be extended, and that major sources of gas will be effectively and economically linked to areas in which there is a rapidly increasing and unsatisfied demand for natural gas.

On October 1, 1957, the Federal Power Commission formally gave notice that it had accepted for filing the applications of El Paso and Pacific Northwest and that the applications had been assigned Commission Docket Nos. G-13018 and G-13019 (22 Fed. Reg. 7776).

Under date of November 7, 1957, the Commission in connection with its proceedings upon the applications, following a detailed review of the applications, requested El Paso to furnish the Commission with extensive additional material. (A copy of the Commission's letter of November 7, 1957, is printed in Appendix A, *infra*, pp. A-6—A-11.)

D. *The proceedings in the District Court on petitioners' motion.*

On September 30, 1957, petitioners moved to dismiss the complaint or, in the alternative, to stay all proceedings in the action until the final determination of the proceedings pending before the Federal Power Commission.*

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* In support of their motion, petitioners submitted the affidavit of Paul Kayser, the president of El Paso, and the affidavit of Stuart F. Silloway, the president of Pacific Northwest. Attached to these affidavits were the applications filed with the Federal Power Commission (the El Paso application, in six volumes, is Exhibit 1 to the affidavit of Paul Kayser; the Pacific Northwest application, in four volumes, is Exhibit 5 to the affidavit of Stuart F. Silloway).

Following the filing of petitioners' motion, the States of Arizona, Colorado, Idaho, Nevada, New Mexico, Texas and Utah, by their respective Attorneys General, applied to the District Court for leave to appear as amici curiae in support of petitioners' motion. The State of Wyoming, by its Attorney General, also applied for such leave to support so much of the motion as asked for a stay of the proceedings in the District Court until a final determination of the Federal Power Commission proceedings. By order dated October 4, 1957, the eight States were authorized to participate as amici curiae. On October 5, 1957, the Court was advised that the State of California supported so much of petitioners' motion as asked for a stay of proceedings in the District Court. Later the State of Oregon, by its Attorney General, applied and was granted leave to appear amicus curiae in opposition to petitioners' motion.

On October 21, 1957, the District Judge denied petitioners' motion from the bench. The reasons of the District Court for its decision were expressed in colloquy with counsel during the hearing (*infra,* pp. A-2—A-5). No written opinion has been rendered.

Petitioners' application for a stay of proceedings in the District Court pending application to this Court for a writ of certiorari was denied by the Court in the hearing on October 21, 1957.

Petitioners answered the complaint on November 12, 1957, and, pursuant to Court direction, are presently engaged with counsel for the United States in scheduling a production of documents from petitioners' files.

REASONS FOR GRANTING THE WRIT

This application for an extraordinary writ is compelled by the refusal of the District Court to recognize the primary jurisdiction, under the Natural Gas Act, of the Federal Power Commission to determine in the public interest after a public hearing the question of whether there should be

a single integrated pipeline system or whether there should be two independently operated pipeline systems. This refusal is in direct conflict with the decisions of this Court in *United States Navigation Co.* v. *Cunard Steamship Co.*, 284 U. S. 474, in *Far East Conference* v. *United States*, 342 U. S. 570, and in *United States* v. *Western Pacific Railroad Co.*, 352 U. S. 59.

The District Court would require the trial of the question of the validity of a stock acquisition under Section 7 of the Clayton Act while the Federal Power Commission has before it the question of whether the acquisition of pipeline facilities by merger should be approved under the Natural Gas Act and thereby exempted from the operation of Section 7 of the Clayton Act pursuant to the terms of that Act.

The Federal Power Commission, as the agency designated by Congress for that purpose, has the primary jurisdiction to apply the broad standards of public interest intended by the Natural Gas Act to govern acquisitions of pipeline facilities, giving appropriate attention to all the relevant factors including the lowest reasonable rates to consumers, adequacy of gas supply, sufficiency of transmission and producing facilities and conservation of natural resources, as well as the policy of the antitrust laws. The decisions of this Court establish that antitrust policy in a regulated industry is not in and of itself determinative. *Federal Communications Commission* v. *R. C. A. Communications, Inc.*, 346 U. S. 86; *McLean Trucking Co.* v. *United States*, 321 U. S. 67.

There is a jurisdictional conflict between the Federal Power Commission, which may under the Natural Gas Act approve the acquisition of facilities, and the United States District Court, which is asked by the Government under the Clayton Act to order El Paso to divest itself of the stock which it has acquired in Pacific Northwest.

It is to resolve this conflict, to effectuate Congressional allocation of functions, and to avoid futile proceedings and inconsistent results that this writ is sought.

I

Petitioners have properly placed before the Federal Power Commission the underlying question in this action.

Petitioners' principal business as natural gas pipeline companies is subject to comprehensive and continuing regulation by the Federal Power Commission under the Natural Gas Act, 52 STAT. 821, as amended, 15 U. S. C. §§ 717-717w. Congress provided the Commission with extensive powers for gathering information regarding the natural gas industry (see Sections 6, 8, 10, 14 and 15; cf. Section 8(a)) and thus established it as the knowledgeable agency in its area of regulation, operating with a staff of highly trained technical experts (see Section 18). The Commission has an extensive knowledge of the territories served, the needs of the citizens thereof and the availability of gas reserves. The Commission effects its regulation primarily through the comprehensive powers of fixing rates and certification of facilities and service (Sections 4 and 5; Section 7).

Under the Natural Gas Act, acquisitions of pipeline facilities, unlike stock acquisitions, can only be made after a company has obtained a Commission certificate of public convenience and necessity.

The El Paso acquisition of control of Pacific Northwest during the first four months of 1957 was framed as a stock acquisition, not requiring Commission approval, for eminently sound business and operating reasons, in order to avoid the long uncertainty which would have resulted in the minds of the customers, employees and security holders of Pacific Northwest at a critical time in its

affairs had an immediate application been made to the Federal Power Commission for approval of the acquisition of physical assets.*

Petitioners did not, however, affect in any way the Commission's continuing and effective regulation of the principal activities of both companies by the manner of framing the particular transaction.

Discussions with the Department of Justice on the subject of the legality of the stock acquisition had been going on since November 1956 and the petitioners had submitted extensive information to the Department of Justice, when the Department of Justice in mid-July 1957 orally advised petitioners that the Department planned to file the complaint in the present action under the Clayton Act. Petitioners immediately took the steps necessary to place before the Federal Power Commission the question raised by the complaint by filing their applications under Section 7 of the Natural Gas Act for approval of the acquisition by El Paso of the pipeline facilities of Pacific Northwest through a merger. The Department of Justice was advised of these steps.

The Jurisdiction of the Commission

The specific aspect of the Federal Power Commission's jurisdiction under the Natural Gas Act which petitioners

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* Affidavits by executives of the two companies, attached to petitioners' motions below, explain this special business situation of Pacific Northwest which its management and directors determined ruled out any course of action which would leave the ownership and direction of the corporation in doubt during protracted proceedings before the Federal Power Commission. (See affidavit of Silloway, pp. 3-4.) The Government argued and the District Court apparently reasoned that framing the transaction as a stock acquisition involved a "calculated risk" of antitrust prosecution which petitioners accepted as a consequence of not submitting the matter to the Commission. Petitioners reaffirm that business and operating reasons dictated by Pacific Northwest's problems determined the form of the transaction. In any event petitioners submit that the motive for placing the acquisition of pipeline facilities before the Commission under Section 7 of the Natural Gas Act does not affect the legal completeness of the act of having submitted it to the appropriate and competent forum or the effect of that submission.

invoked by their applications reflects the special Congressional policy regarding the role of competition in the natural gas industry and indicates that it is a matter to be regulated by the Commission.

Section 7(c) of the Natural Gas Act is the specific provision requiring certification of acquisitions of pipeline facilities. Speaking of Section 7(c) of the Act, during the Committee hearings regarding the bill, the sponsor of the legislation, Representative Lea of California, explained:

> "We must eventually reach a conclusion one way or another, whether we trust the [Federal Power] Commission. If we can trust the Commission with the important duty of fixing our rates, why can we not trust them with the question of two lines or one? . . .
>
> • • • • •
>
> "The question is whether you are going to have one or two. The power is given to the Commission to decide, under the circumstances, whether it will permit another company to go in there and compete or take over a certain territory instead of the old company.
>
> • • • • •
>
> "And the Commission must make that decision from the standpoint of public convenience and necessity. . . ." (Hearings before the House Committee on Interstate and Foreign Commerce on H. R. 4008, 75th Cong., 1st Sess., 82-83.)

Congress by enacting Section 7(c) entrusted the Commission with the "question of two lines or one". The applications respecting the acquisition of facilities filed on August 7, 1957, by El Paso and Pacific Northwest under Section 7 of the Natural Gas Act put precisely that question to the Commission to decide.

This it must do with expert attention to the problems special to the natural gas industry and to the problems of the communities served which Congress recognized and committed to the determination of the Commission.

Respondent has never challenged petitioners' right under Section 7 of the Natural Gas Act to file with the Commission their applications respecting the acquisition of the pipeline facilities.

Respondent has never challenged, either before the District Court or before the Federal Power Commission, the jurisdiction of the Commission under the Natural Gas Act to proceed to a determination of the petitioners' applications.

Nor could there be any valid basis for such challenges.

Section 7(e) of the Natural Gas Act clearly recognizes the right of natural gas companies to file applications for certificates of public convenience and necessity and to have them passed upon by the Commission.

The mere fact that a complaint has been filed in a court action cannot abrogate this Congressional authorization for certificate proceedings under the Natural Gas Act. Cf. *Securities and Exchange Commission* v. *Otis & Co.*, 338 U. S. 843, reversing 176 F. 2d 34 (C. A. D. C.). Congressional policy expressed in a major regulatory scheme may not be diverted by individual lawsuits. *Texas and Pacific Railway Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426, 440. The Commission quite properly accepted for filing petitioners' applications (22 Fed. Reg. 7776) after the action under Section 7 of the Clayton Act had been instituted in the District Court, and is now going forward toward their consideration (*infra*, p. A-6).

It is clear that this right to file applications is not in any way diminished in this case by the fact that the applications followed the stock acquisition or, indeed, were occasioned by the filing of the present action. The jurisdiction of the regulatory agency has not been impaired. Cf. *Georgia* v. *Pennsylvania Railroad Co.*, 324 U. S. 439. Rather, the stock acquisition is employed as the first step in effecting a consolidation, the validity and propriety of

which is placed by petitioners' applications before the regulatory tribunal designated by Congress to consider this question.

The Error of the Court Below

The District Court in no way questioned the efficacy of petitioners' applications to the Commission. It accepted, as we submit it must, the jurisdiction of the Commission but held that the action instituted under Section 7 of the Clayton Act seeking to require divestiture of the stock of Pacific Northwest did not involve anything placed before the Commission by petitioners' applications under Section 7 of the Natural Gas Act.

The Court expressly stated its understanding and, indeed, seemed to rest its decision on the assumption that the only issues before it "are the ordinary, usual issues in Clayton Act proceedings, nothing more, nothing less" (*infra*, p. A-4). The Court assumed that trial of the action would not involve "anything at all that is properly before the F. P. C. or that can be brought before the F. P. C." (*infra*, p. A-5).*

But the essential question before the Federal Power Commission and before the District Court is the same: Is it in the public interest of the people of the territories served that there be two independently operated pipeline systems or a single integrated system?

The problems presented to the Commission by the asset acquisition comprehend the basic problems presented to the Court below by the complaint in this action and embrace the wider range of policy considerations relevant under the Natural Gas Act.

The complaint's attack on El Paso's acquisition of Pacific Northwest stock is founded on the economic significance of the control of the underlying assets which will flow from the stock acquisition.

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* It was on this demonstrably erroneous ground that the District Court distinguished the prior decisions of this Court (*infra*, p. A-5).

All the purported anti-competitive significance ascribed by the complaint to the acquisition of the stock reduces itself to one concern: that the resulting common control will deprive the acquired company of significant being as a competitive entity. The stock acquisition is attacked only because it is a first step in the unification, through common control or merger, of the operations of the two companies.

In fact, while the Department of Justice does not nominally sue against the asset acquisition now before the Federal Power Commission under the Natural Gas Act, the complaint expressly alleges that "announcement has been made of plans to coordinate and integrate the operations of both pipelines" (paragraph 12).

The complaint thus reflects the teaching of the legislative history. Before Section 7 of the Clayton Act was amended in 1950, it applied only to stock acquisitions. The 1950 amendment equalled the antitrust significance of asset and stock acquisitions:

> ". . . Since the acquisition of stock is significant chiefly because it is likely to result in *control of the underlying assets*, failure to prohibit direct purchase of the same assets has been inconsistent and paradoxical as to the over-all effect of existing law." (Sen. Rep. No. 1775, 81st Cong., 2nd Sess. 2.) (Emphasis added.)

Control of assets however achieved is the operative act against which amended Section 7 of the Clayton Act is directed.

Stockholding is significant only as it threatens or expresses control over the underlying assets. So it is that Section 7 of the Clayton Act relieves from its proscription stock acquisitions made solely for investment.

This Court's decision in *Arrow-Hart & Hegeman Electric Co.* v. *Federal Trade Commission*, 291 U. S. 587, largely

begot the 1950 amendment of the Clayton Act, Section 7. In that case after the Federal Trade Commission proceeded under Section 7 of the Clayton Act to compel a holding company to divest itself of the stock of two operating companies, a reorganization was effected whereby all the properties of the operating companies were acquired through mergers by a new corporation, under the same ultimate control, and the holding company was dissolved. A majority of this Court, noting that Section 7 of the Clayton Act did not then forbid acquisition of assets (291 U. S. at 595), found that the mergers were not within reach of the Clayton Act and that the Federal Trade Commission was without power in the circumstances.

Four members of this Court dissented in the *Arrow-Hart & Hegeman* case (HUGHES C. J., BRANDEIS J., STONE J., and CARDOZO J.). The dissenting opinion of Mr. Justice STONE emphasized that many corporate consolidations are accomplished in two steps, the acquiring company first acquiring a controlling stock interest and then merging the new subsidiary into itself (291 U. S. at 600-1). Mr. Justice STONE proceeded to say (291 U. S. at 601-2):

> "... It seems plain, therefore, that the illegality involved in acquiring the common stock of the competing companies, which was the first step toward the merger, was neither lessened nor condoned by taking the next and final steps in completing it. There is, then, no basis for contending that the Act has not been violated, or that the violation has been excused simply because *events were pushed to the very conclusion that § 7 was designed to forestall.*" (Emphasis added.)

The 1950 amendment to the Clayton Act translated this view into law. See the discussion of the *Arrow-Hart & Hegeman* case in H. R. Rep. No. 1191, 81st Cong., 1st Sess. 4-5, 11-12.

If merger of El Paso and Pacific Northwest, representing the fullest degree of unification of the two companies

and "the very conclusion" with which Section 7 of the Clayton Act is concerned, is warranted by the public convenience and necessity so that the Federal Power Commission must determine that it is valid, there can be no basis for objecting to the stock acquisition prefatory to the legal acquisition of the physical assets.

Had the District Court suit been directed against the asset acquisition initiated by the petitioners' filing with the Federal Power Commission under Section 7 of the Natural Gas Act, there would have been no basis, not even a verbal one, to distinguish the District Court action from the Federal Power Commission proceedings.

The essence of the error committed by the District Court thus lay in its artificially separating the stock from the asset acquisition, although Section 7 of the Clayton Act accords them a single antitrust significance. Only on this fallacious basis could the District Court suggest that the trial of the District Court action would not involve "anything at all that is properly before the F. P. C. or that can be brought before the F. P. C." (*infra*, p. A-5).

Prevention of unification is the gist of the complaint just as seeking approval of unification is the purpose of the Federal Power Commission proceedings.

II

The underlying question in this action should be passed upon in the public interest by the Federal Power Commission under the Natural Gas Act.

Congress has provided that it is the standards of the Natural Gas Act and not of the Clayton Act that are to govern the underlying question in this case, and that the Federal Power Commission, not the District Court, is the appropriate tribunal for application of the standards.

The final paragraph of Section 7 of the Clayton Act (*infra*, p. B-4) and the legislative history of that paragraph confirm this. The paragraph reads in relevant part as follows:

> "Nothing contained in this section shall apply to transactions duly consummated pursuant to authority given by the . . . Federal Power Commission . . . in the exercise of its jurisdiction . . . under . . . any statutory provision vesting such power in such Commission. . . ."

This deference to Commission jurisdiction over acquisitions proceeds essentially upon the assumption that the role of competition in matters regulated by the Federal Power Commission is for that Commission to determine.

When the Temporary National Economic Committee in 1939 transmitted a preliminary report suggesting substantive changes in the antitrust laws, the precursor of the exemption provision in Section 7 was set forth in the preliminary report with the explanation that "This will avoid any conflict between the provisions of Section 7 and the acts administered by the said agencies." Sen. Doc. No. 95, 76th Cong., 1st Sess., 21.

In 1947, when a version of a revised Section 7 of the Clayton Act was under consideration, a representative of the Attorney General recommended that the exemption paragraph be deleted as unnecessary, since the bill would not affect the powers of the administrative bodies under the specific statutes which they administer. (See Hearings before Subcommittee No. 2 of the House Committee on the Judiciary, 80th Cong., 1st Sess., Ser. No. 3, 241.)

Mr. Kefauver, a chief supporter of the bill, commented:

> ". . . the Attorney General has recommended that that whole paragraph . . . be omitted, but all of these agencies involved, . . . have specifically asked that this exclusion be placed in the bill, and they fear

> that with [sic] its reenactment without the exclusions might cause some confusion insofar as their power and jurisdiction is concerned. So, I would like to ask that all of the agencies remain excluded as is . . ." (at 258).

During the hearings in the 81st Congress, which actually passed the amendment to Section 7, the Securities and Exchange Commission suggested that as to it the exemption clause should be limited to apply only to transactions approved under the Public Utility Holding Company Act of 1935. The Commission's reasoning was that the Holding Company Act was the only statute it administered which involved the regulation of transactions invoking broad considerations of public interest and which gave it regulatory powers comparable in scope with those of the other agencies concerned. Since the bill had already passed the House, the Securities and Exchange Commission suggested that its end could be achieved without further amendment of the proposed statutory language, if the Senate Committee Report contained the following:

> "The last paragraph of section 7 is new. It exempts from the provisions of section 7 transactions consummated pursuant to authority given by the ICC, CAA, FCC, FPC, SEC and the Secretary of Agriculture. These agencies already have jurisdiction over various types of public utilities, natural monopolies, and quasi-monopolies. The statutes vesting these agencies with a licensing authority over combinations by or affecting such companies take into account the effect of the combination as such on the public interest, and the continued regulatory jurisdiction of the named agencies and in some cases State agencies as well tends to prevent abuses inherent in monopoly. These Federal statutes are addressed to the peculiar problems of the industries and corporations involved, and there is no desire to supersede them in this statute of general application

> which is designed essentially to fill the gaps in existing law. . . ." (Hearings before a Subcommittee of the Senate Committee on the Judiciary, 81st Cong., 1st and 2nd Sessions, 141-142.)

With this interpretation the Justice Department representative to the Legislative Committee agreed (at 143 of Hearings, *supra*).

Although this explanation was not incorporated into the committee report, this was simply because the specific statutory language, limiting the immunizing effect of SEC approval to transactions regulated in the manner described in the explanation, was finally added to the statute, rendering the explanatory paragraph unnecessary.*

The House Report had expressed in summary form much the same idea:

> "The last paragraph of section 7 is new. It simply provides that provisions of the bill should not apply to corporations coming under the jurisdiction of ICC, CAA, FCC, FPC, SEC, and the Secretary of Agriculture. These agencies already have jurisdiction over these corporations, and there is no disposition to change the present arrangement regarding them." (H. R. Rep. No. 1191, 81st Cong., 1st Sess., 6.)

This statutory history and the language of the exemption provision reflect the underlying premise that the Natural Gas Act, a specific statutory scheme regulating an industry in detail and endowing the Federal Power Commission with power to pass on whether an acquisition is in the public interest, represents Congress' determination of how and by whom an acquisition should be evaluated.

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* Recognition that the United States Maritime Commission had been inadvertently omitted from the exemption provision necessitated amendment of the statutory language of the House version, and the reason for putting the SEC's statement in the report was eliminated. (Hearings before a Subcommittee of the Senate Committee on the Judiciary, 81st Cong., 1st and 2nd Sessions, 152-155.)

Congress has thus emphasized the cross-currents of the Clayton Act and the Natural Gas Act and has provided the device to avoid the clash between the two, giving primacy, in the case of acquisitions, to the specific Natural Gas Act policy over the general antitrust policy.

In accordance with this determination of Congress, the Commission can weigh the antitrust factors,* but in the context of the overall national policy for the gas industry, utilizing its technical staff, expert knowledge, background information, and continuing regulatory authority to reach its decision.**

The Commission twelve years after the enactment of the Natural Gas Act stated its responsibilities under the Act in the following manner:

> "We think it appropriate in this case to reemphasize some of our responsibilities under the Natural Gas Act in determining whether authorization of a project subject to our jurisdiction is required by the public convenience and necessity. As we said in our

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* See *City of Pittsburgh* v. *Federal Power Commission*, 237 F. 2d 741, 754 (C.A.D.C.). The Department of Justice can intervene before the Federal Power Commission and itself raise any antitrust issues. See *Rules of Practice and Procedure* of the Federal Power Commission, § 1.8.

** In its administration of the Natural Gas Act the Commission at an early time took occasion to state the standards upon which it would judge applications for certificates of public convenience and necessity in effectuating Congressional policy. *Kansas Pipe Line & Gas Co.* and *North Dakota Consumers Gas Co.*, 2 F.P.C. 29, cited by this Court with apparent approval in *Illinois Natural Gas Co.* v. *Central Illinois Public Service Co.*, 314 U. S. 498, 509. The Commission declared, as a minimum, its interest in gas supply, market demand, transmission facilities, financing plans and economic feasibility of any proposed project for construction or expansion which is submitted for certification. In cases involving the acquisition of facilities by merger or otherwise, these areas of consideration come to be analyzed in terms of the effect of the acquisition upon the supply of gas, the inter-relation of market demand, the appropriateness of the design and function of the facilities when integrated, the financing capacities of the merged enterprise and the overall economics of the operation of the integrated company. See, for example, *Colorado Interstate Gas Co.*, 10 F.P.C. 105.

> opinion, In the Matter of Michigan-Wisconsin Pipe Line Co., Docket No. G-669, 6 F. P. C. 1: 'Public convenience and necessity comprehends a question of the public interest. Or stated another way: Is the proposal conducive to the public welfare? Is it reasonably required to promote the accommodation of the public?' *The public interest we referred to has many facets. To the limit of our authority under the law our responsibility encompasses them all . . .*" (*Commonwealth Natural Gas Corp.*, 9 F. P. C. 70, 85.) (Emphasis added.)

If the Federal Power Commission in the exercise of its Congressionally-created role under the Natural Gas Act should find that El Paso's acquisition by merger of the pipeline facilities of Pacific Northwest is required by public convenience and necessity, that finding would adjudicate that El Paso's acquisition of control of the principal assets of Pacific Northwest is in the public interest. Moreover, by the express terms of Section 7 of the Clayton Act that determination would render the provisions of the Clayton Act inapplicable.

So it results that the present continuation of the antitrust action in the District Court under Section 7 of the Clayton Act is ultimately directed to usurping that power of the Federal Power Commission to decide the underlying question in the public interest under the Natural Gas Act which is, by the very terms of the Clayton Act, determinative of the application of that statute.

Competing proceedings before court and agency can defeat application of the special standards which under Congressional mandate the regulatory agency must apply. This Court has on various occasions commented upon the differences between the standards of regulatory statutes and of the antitrust laws. *E.g., Federal Communications Commission* v. *RCA Communications, Inc.*, 346 U. S. 86, 91-2; *McLean Trucking Co.* v. *United States*, 321 U. S. 67, 84-85. Here also competition is not the sole criterion.

The Department of Justice complained below because the hearings before the Commission "will relate principally to the economic questions involved in the consolidation of the facilities of the two companies, and questions relating to service, availability of supplies, and similar matters." (Plaintiff's brief in the District Court, p. 26.)

These are precisely the considerations to which Congress by the Natural Gas Act advertently instructed the Federal Power Commission to give effect.

Proceedings before the District Court based upon antitrust analysis in isolation would be fundamentally inconsistent and irreconcilable with the proceedings which the Federal Power Commission will conduct pursuant to Congressional mandate under its established practice. Even if the District Court were to acknowledge the applicability of the Natural Gas Act and attempt to give it some effect in deciding the antitrust question before it, the peculiar function of the Commission as the Congressionally designated agency for regulation in this area of commerce in the public interest is legally irreplaceable by action of the courts. Cf. *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co.*, 341 U. S. 246, 251; *Pennsylvania Water & Power Co.* v. *Federal Power Commission*, 343 U. S. 414, 422. These are the very reasons that have called forth the doctrine of primary jurisdiction. See *Far East Conference* v. *United States*, 342 U. S. 570, 574.

III

The District Court's decision on the jurisdictional question is in direct conflict with decisions of this Court.

This Court has recently described the doctrine of primary jurisdiction as one which applies

> ". . . where a claim is originally cognizable in the courts, and comes into play whenever enforcement

> of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body; in such a case the judicial process is suspended pending referral of such issues to the administrative body for its views." (*United States* v. *Western Pacific Railroad Co.*, 352 U. S. 59, 64.)

The doctrine thus summarized was announced in the Supreme Court in *Texas and Pacific Railway Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426, and elaborated upon in *Keogh* v. *Chicago & Northwestern Railway Co.*, 260 U. S. 156; *United States Navigation Co.* v. *Cunard Steamship Co.*, 284 U. S. 474; and *Far East Conference* v. *United States*, 342 U. S. 570; as well as numerous other cases.

The reasons for the doctrine were summarized in *Far East Conference* v. *United States*, as follows:

> ". . . in cases raising issues of fact not within the conventional experience of judges or cases requiring the exercise of administrative discretion, agencies created by Congress for regulating the subject matter should not be passed over. This is so even though the facts after they have been appraised by specialized competence serve as a premise for legal consequences to be judicially defined. Uniformity and consistency in the regulation of business entrusted to a particular agency are secured, and the limited functions of review by the judiciary are more rationally exercised, by preliminary resort for ascertaining and interpreting the circumstances underlying legal issues to agencies that are better equipped than courts by specialization, by insight gained through experience, and by more flexible procedure." (342 U. S. at 574-575.)

These reasons are directly applicable to the case at hand. We submit that this Court's decisions applying the doctrine of primary jurisdiction govern the disposition of this case.

The *Cunard* case (284 U. S. 474) was a suit under the antitrust laws alleging an illegal conspiracy against competition involving a dual rate system and a scheme of joint exclusive patronage contracts. Use of such other anti-competitive devices as rebates, rumor-mongering, threat of boycott and black-listing was also alleged.

The Court examined the provisions of the Shipping Act and found they dealt with many of the activities complained of:

> "That the Shipping Act covers the dominant facts alleged in the present case as constituting a violation of the Antitrust Act is clear." (284 U. S. at 483.)

This Court concluded that since the Shipping Act was to its own industry as comprehensive a measure as the Interstate Commerce Act under which the primary jurisdiction cases developed, the reasoning of those cases that the "accomplishment of the purpose of Congress could not be had without the comprehensive study of an expert body continuously employed in administrative supervision" (284 U. S. at 483) was applicable, and the "matter therefore, is within the exclusive preliminary jurisdiction of the Shipping Board." (284 U. S. at 485.)

The Court for this reason affirmed the dismissal of the suit.

This Court in the *Cunard* case recognized that the results of such an evaluation by the expert regulatory agency, according to the special standards and policy prescribed by Congress for specific activities in that industry, might not comport with what would otherwise have been the evaluation of the problem by a court. (284 U. S. at 485.) Thereafter the Court noted:

> ". . . Moreover, having regard to the peculiar nature of ocean traffic, it is not impossible that, although an agreement be apparently bad on its face, it properly might, upon a full consideration of all

the attending circumstances, be approved or allowed to stand with modifications." (284 U. S. at 487.)

In the *Far East Conference* case (342 U. S. 570), the United States brought suit to enjoin violations of the Sherman Act allegedly resulting from a dual rate system pursued by defendant steamship companies. A motion to dismiss on primary jurisdiction grounds had been denied and this Court granted certiorari under 28 U. S. C. § 1651 to determine at the threshold whether "a District Court can pass on the merits of the complaint before the Federal Maritime Board has passed upon the question." (342 U. S. at 573.)

This Court reversed the decision below and held that the *Cunard* case governed.

The *Far East Conference* case makes clear that the reason for the result—the necessity for accomplishing the purpose of Congress—is equally conclusive whether the complainant be a private individual or the United States government: Congress having provided a comprehensive regulatory statute expressing a particular policy for a specific industry and providing for evaluation of certain activities by the expert agency charged with implementing that policy, the effectuation of Congressional intent could not depend upon the accident of which plaintiff brought the suit.

This Court's recent decision in the *Western Pacific Railroad* case, 352 U. S. 59, involved a suit under the Tucker Act by carriers for charges allegedly due from the United States. The question arose as to the applicability of a tariff. Since determination of that question involved issues of transportation policy "which ought to be considered by the Commission in the interests of a uniform and expert administration of the regulatory scheme laid down by the [Interstate Commerce] Act" (352 U. S. at 65), this Court held that the question of the application of the tariff was for the Commission to determine.

The argument was made that the United States could not then invoke the Commission's jurisdiction because the statute of limitations in the Interstate Commerce Act would have barred a suit by the United States before the Commission. The Court rejected this argument and stated:

> "... We think it would be incongruous to hold that once a lawsuit is properly before the Court, decision must be made without consideration of all the issues in the case and without the benefit of all the applicable law. . . ." (352 U. S. at 72.)

The application to this case of the principles of *Cunard, Far East Conference* and *Western Pacific Railroad* is apparent from the specific provisions of the Natural Gas Act governing the underlying question in the action;* from the necessity for a technical and expert evaluation of the factors of public interest; from the divergence between the policy of the Natural Gas Act and of the Clayton Act;** and from

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* The specific provision of the Natural Gas Act with respect to acquisitions, the underlying question in issue, significantly differentiates this case from *United States* v. *Borden Co.*, 308 U. S. 188, where the claim was made and rejected that availability of an administrative procedure with respect to certain issues required preliminary reference to the agency of other issues not made the subject of the administrative process. The claim was also made and rejected that the mere fact of regulation of certain aspects of an industry rendered the Sherman Act *per se* inapplicable to the entire industry. Petitioners in the present case do not so claim.

** The differences in policy between Section 7 of the Clayton Act and the Natural Gas Act must be contrasted to the relationship between Section 5 of the Webb-Pomerene Act and the Sherman Act which was reviewed in *United States Alkali Export Association, Inc.* v. *United States*, 325 U. S. 196. There the Federal Trade Commission's limited functions under the Webb-Pomerene Act were regarded by this Court as of an investigatory nature intended to implement the enforcement of the antitrust laws. (325 U. S. at 207.) Furthermore, the Federal Trade Commission could "• • • make no controlling finding of law or fact. Its recommendation need not be followed by any court or administrative or executive officer." (325 U. S. at 210.)

By contrast, approval by the Federal Power Commission of the acquisition in question is binding by the very terms of the Clayton Act.

the impossibility of the District Court's acting regarding the stock acquisition without usurping the function of the Federal Power Commission.*

The doctrine of primary jurisdiction does not exist for the purpose of permitting the agency to enforce the antitrust laws or to fashion the antitrust remedy. In the *Far East Conference* case the Maritime Board had no authority to enforce the Sherman Act. (342 U. S. at 578.) The touchstone of the doctrine is the agency's "special competence" in the scheme for regulation projected by Congress and not whether the agency can give the relief requested in the lawsuit. This Court applied the doctrine of primary jurisdiction in *General American Tank Car Corp.* v. *El Dorado Terminal Co.*, 308 U. S. 422, even though the agency to which reference was made, on primary jurisdiction grounds, could not provide the remedy requested or try the matter complained of. See, also, *Keogh* v. *Chicago & Northwestern Railway Co.*, 260 U. S. 156; *S. S. W., Inc.* v. *Air Transport*

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* This case, unlike *Georgia* v. *Pennsylvania Railroad Co.*, 324 U. S. 439, does not involve a continuing conspiracy outside the jurisdiction of the agency which must be enjoined in order to preserve the integrity of agency regulation. The stock acquisition here involved raises the same underlying question as the asset acquisition and derives its validity or invalidity from the asset acquisition. Unlike *Georgia* v. *Pennsylvania Railroad*, the underlying question in this case of the propriety of the acquisition is specifically dealt with by the regulatory statute, the Federal Power Commission can "approve or condone" (324 U. S. at 461) the acquisition, and respondent in effect seeks "to have the Court act in the place of the Commission" (324 U. S. at 459) as to this underlying question. This Court in *Georgia* v. *Pennsylvania Railroad* recognized such distinctions when it distinguished the case before it in which such separation of questions was possible from the case where:

> ". . . [T]here is no way by which the agreement itself can be assailed by injunction except by restraining acts done in performance of it. That, in this case, the statute forbids, not because the contract is within the jurisdiction of the Interstate Commerce Commission, but because the acts done in performance of it, which must necessarily be enjoined if any relief is given, are matters subject to the jurisdiction of the Commission." (324 U. S. at 455.)

Ass'n, 191 F. 2d 658 (C.A.D.C.), *cert. denied*, 343 U. S. 955; *Apgar Travel Agency* v. *International Air Transport Association*, 107 F. Supp. 706, 711 (S.D.N.Y.). This was also true in the *Western Pacific Railroad* case, 352 U. S. 59.

If this lawsuit brought under the Clayton Act is held in abeyance, the Federal Power Commission will proceed, unhampered, to evaluate the proposed unification. If it finds that the unification meets the standards of Sections 7(c) and (e) of the Natural Gas Act and if it approves the unification, it would be implementing Congressional intent as to the method and standards for determining the validity of the transaction, and the approval, by statute, will automatically work to render Section 7 of the Clayton Act inapplicable to El Paso's acquisition of the pipeline facilities of Pacific Northwest.*

This would be completely in accord with Congressional intent and policy for the natural gas industry. This would be the "remedy" which Congress has deemed appropriate.

If the Commission's order disapproves the acquisition, it would be appropriate then for the District Court to proceed with the lawsuit, with the findings of the expert tribunal before it and with the assurance that Congressional policy regarding the industry has been respected. The "remedy" of divestiture or injunction would then be

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* Like most natural gas companies, Pacific Northwest also possesses certain assets incidental to its natural gas activities which are not subject to the jurisdiction of the Federal Power Commission. Respondent argued in the Court below that the existence of these non-jurisdictional assets, though admittedly minor, nevertheless necessitates the continuation of the Clayton Act suit in the District Court. We suggest that if the Government is serious in its intention to continue this suit even in the absence of any question regarding the jurisdictional facilities, the District Court must await the outcome before the Federal Power Commission so that the proper limits of the suit can be ascertained. The presence of activities in *Cunard* which were not of a jurisdictional nature was not regarded by this Court as reason for precluding the primary jurisdiction of the agency in that case where the "dominant facts" were within the agency's jurisdiction.

available to a successful plaintiff—but for reasons and after proceedings which took into consideration the full policy and intent of Congress.

The fact that the petitioners did not place the question of the acquisition of assets before the Federal Power Commission under the Natural Gas Act until after the lawsuit seeking divestiture of the stock was brought should not be reason for now continuing to proceed in the District Court under the Clayton Act in advance and without knowledge of the determination of the Federal Power Commission and in disregard of the intent of Congress governing pipeline acquisitions. Decision cannot "be made without consideration of all the issues in the case and without the benefit of all the applicable law." *United States* v. *Western Pacific Railroad Co.*, 352 U. S. at 72.

In the *Cunard* case and in the *Far East Conference* case, the dual rate contracts which were the object of antitrust attack could have been filed with the Maritime Board, approval by which Board would, by statute, render the contracts lawful and impervious to antitrust attack.

The mere possibility of exemption from antitrust attack was significant in those cases. That the contracts had not in fact been filed did not deter this Court from referring the matter to the agency—the possibility of exemption by agency approval evidenced the priority intended by Congress for agency action.

Here, too, the possibility of exemption is significant. Indeed in the *Far East Conference* case, the failure to file the dual rate contracts with the Maritime Board persisted past the time of institution of suit right through the time of decision by the Supreme Court (see 342 U. S. at 579; c.f. *Cunard*, 284 U. S. at 486). Here, by contrast, the necessary submission to the Federal Power Commission under the Natural Gas Act has already been made.

As in *Cunard and Far East Conference* there is a comprehensive regulatory statute which specifically addresses

itself to the issue raised by the complaint. That issue is to be judged by the standards of the specific regulatory legislation, and the judgment

> ". . . may depend upon a consideration of economic relations, of facts peculiar to the business or its history, of competitive conditions . . . and of other relevant circumstances, generally unfamiliar to a judicial tribunal, but well understood by an administrative body especially trained and experienced in the intricate and technical facts and usages of the . . . trade; and with which that body, consequently, is better able to deal." (*United States Navigation Co.* v. *Cunard Steamship Co.*, 284 U. S. at 485.)

The District Court could not, even if it wished to do so, cope with the technical data and engineering studies pertinent to the Commission applications, does not have the extensive background and accumulated knowledge regarding the industry possessed by the agency, and can not evaluate and pass upon these applications in the context of continuing regulatory control over the operations of these companies, as well as over the plans and operations of other regulated companies raising similar or interrelated problems. The agency empowered by Congress for the purpose should not be passed over.

This belongs in the category of "cases raising issues of fact not within the conventional experience of judges or cases requiring the exercise of administrative discretion. . . ." *Far East Conference* v. *United States*, 342 U. S. at 574.

IV

The jurisdictional error committed by the District Court requires immediate correction by this Court.

Prior decisions of this Court specifically affirm the propriety of issuing an extraordinary writ of certiorari where (a) this Court has direct appellate jurisdiction and (b) a

District Court has denied a motion which raised an important jurisdictional question as to the allocation of functions between the courts and an administrative agency. *United States Alkali Export Association, Inc.* v. *United States,* 325 U. S. 196, 201-204; *Far East Conference* v. *United States,* 342 U. S. 570, 572. These cases are dispositive of any question respecting the availability of the writ in the present case.*

(a) Under Section 2 of the Expediting Act (32 STAT. 823, as amended, 15 U. S. C. § 29), this Court has exclusive appellate jurisdiction of this civil action brought by the United States under the antitrust laws. Under these circumstances, no appellate relief is available in any United States Court of Appeals and the present application must, therefore, be made to this Court. *United States Alkali Export Association, Inc.* v. *United States,* 325 U. S. 196, 202.

(b) As in the *United States Alkali Export* case (325 U. S. at 203) and in the *Far East Conference* case (342 U. S. at 572), the denial of petitioners' motion requires an authoritative determination of the proper allocation between a District Court and an administrative agency, in the light of Congressional policy, of functions yet to be performed. Present resolution of the jurisdictional question, before either tribunal has acted, is essential to delimit

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* The specific statutory authority for the issuance of the writ in the *United States Alkali Export* case (325 U. S. 196, 201) was Section 262 of the Judicial Code, 28 U. S. C. § 377 (1940). This provision was superseded by the enactment of the 1948 All Writs Act, 62 STAT. 944, as amended, 28 U. S. C. § 1651(a), pursuant to which provision the writ was issued in the *Far East Conference* case (342 U. S. 570, 572). In connection with the 1948 revision of Title 28, the reviser's notes on Section 1651(a) contain the following explanation: " . . . The revised section is expressive of the construction recently placed upon such section by the Supreme Court in *U. S. Alkali Export Assn.* v. *U. S.*, 65 S. Ct. 1120, 325 U. S. 196, 89 L. Ed. 1554, and *De Beers Consol. Mines* v. *U. S.*, 65 S. Ct. 1130, 325 U. S. 212, 89 L. Ed. 1566." H. R. Rep. No. 308, 80th Cong., 1st Sess. A 145.

the course and scope of the proceedings to be conducted and to avoid frustration of Congressional policy.

At this moment two federal tribunals are at the point of going forward to decide in substance the same question according to the differing standards of two distinct national policies. An unseemly race of diligence is invited in which pragmatically the ultimate result could turn on which tribunal moves more swiftly.

If Congress, as petitioners submit, has designated the Federal Power Commission as having primary authority to evaluate and to determine the underlying question in the case before the District Court, the continuation at this time by the District Court of its competing proceedings can only be regarded as an attempted usurpation of the Commission's primary jurisdiction inviting conflict, uncertainty, frustration of the orderly administration of justice and defeat of the national policy expressed in the Natural Gas Act.

The District Court's decision, by allowing two competing proceedings, presently places a cloud upon the Commission proceedings.

The continuing uncertainty as to the relation between the two competing proceedings would necessarily influence business decisions which directly affect matters of regional fuel supply and industrial development in a large area of the country, with far-reaching effect upon the very matters of supply, markets, economic feasibility and consumer service with which the Federal Power Commission is concerned in the certificate proceedings.

As recognized by the grants of certiorari in the *United States Alkali Export* case and in the *Far East Conference* case, Congressional policy respecting the allocation of functions would be substantially impaired if not frustrated long before the time of appeal from final judgment. The presence of this peculiar problem regarding the allocation of functions, acutely presented in the present case, renders

appropriate the issuance of the extraordinary writ for which the petitioners pray.

The public importance of the question presented is attested by the participation in the Court below of Attorneys General from ten States, served by petitioners' pipeline systems, which are acutely interested in how the consolidation of El Paso and Pacific Northwest will affect their citizens and their economic well being. The nine States supporting petitioners' motion* made it clear that they support petitioners' position as the way in which the most comprehensive economic evaluation of the unification of El Paso and Pacific Northwest can be made.

For that reason they support a review of the consolidation, at least in the first instance, by the Federal Power Commission.

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* Of the nine States, the States of California and Wyoming limit their support of petitioners' motion to so much as asks for a stay of proceedings before the District Court.

Conclusion

For the foregoing reasons, this petition for a writ of certiorari should be granted to determine the question, urgently posed by the competing proceedings, of the proper relation between the Natural Gas Act and the Clayton Act.

Respectfully submitted,

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November 26, 1957.

APPENDIX A

Order

IN THE

United States District Court

FOR THE DISTRICT OF UTAH
Central Division

UNITED STATES OF AMERICA, *Plaintiff,* VS. EL PASO NATURAL GAS COMPANY and PACIFIC NORTHWEST PIPELINE CORPORATION, *Defendants.*	Civil No. 143–57 ORDER

Defendants having filed on September 30, 1957, a Motion to Dismiss these proceedings or in the alternative to stay all proceedings pending determination in the Federal Power Commission of certain applications there filed on August 7, 1957, and the Court having duly considered the Motion, affidavits in support thereof and affidavits in opposition thereto filed by the Government, and having heard argument on the Motion;

IT IS ORDERED that the Motion to Dismiss or in the alternative to stay these proceedings is hereby denied.

DATED this 21st day of October, 1957.

/s/ WILLIS W. RITTER

Willis W. Ritter
Chief Judge

Excerpt from Transcript of Proceedings of October 21, 1957

The Court: Is there anything further?

For this Court to abdicate his jurisdiction in favor of that of the F. P. C. I think I should wish to have some authority more compelling than any authorities that have been submitted to me.

Mr. Dean: Would your Honor give us a certain period of time in which to file a further memorandum with you.

The Court: No, I am prepared to decide this motion this afternoon. I think we have had a good deal of time. I am sure if there had been any cases any more nearly in point than those you have cited me, you would have had them here.

Mr. Dean: Well, it seems to us, your Honor, the cases we have cited, the Cunard case and the Far Eastern Conference case, are controlling in this matter. The Supreme Court, I think, has made it very clear that it is not necessary for the administrative agency to be able to grant the relief requested. I think that was clear in the El Dorado-General American Tank Car Corporation case. And I think the City of Pittsburgh case makes it clear the Federal Power Commission can consider the antitrust questions, as well as the questions of public interest, under the Natural Gas Act.

As I read the cases, your Honor, it does seem to me that the Supreme Court has said that under this doctrine of primary jurisdiction that the courts must, in the first instance, allow the administrative agencies appointed by the Congress to pass upon these matters.

The Court: Well, you folks saw to it in the beginning of this transaction that they couldn't pass on it. You chose, as the initial move, to accomplish your ends by a stock acquisition.

The F. P. C. hasn't any jurisdiction to deal with that at all and never will have unless Congress changes the law.

El Paso and Pacific Northwest had a choice when they moved into this transaction. They had a choice, then and

there, to apply to the F. P. C. for a certificate to acquire the assets. Well, they didn't choose to do it.

Now, if the F. P. C. had granted your application, you would have had antitrust immunity.

Mr. Dean: Not according to Mr. Jacobs.

The Court: Well, according to you.

Mr. Dean: Yes, sir.

The Court: Now, you didn't choose to proceed that way. You knew, when you made that stock acquisition, that there was a risk and you took, as Mr. Jacobs said this morning, a calculated risk about that.

Now, the solution would have been a happy one if the Government had not moved under the Clayton Act, but the Government has moved under the Clayton Act. Now you want to go back and do what you might have done in the beginning, and you are asking this Court to abdicate its jurisdiction to decide the very point under Section 7 of the Clayton Act which you have made it necessary for us to decide here, really, by your choice.

I think the narrow question before us is whether your stock acquisition is in violation of Section 7 of the Clayton Act, and I do not believe, under any view of the matter, that you can urge that that question is a question which Congress has given for decision to that administrative agency. We are all in agreement about that.

Now, you undertook to say in your brief that the stock acquisition and the asset acquisition are one and the same thing. I do not think they are. As a matter of fact, you are a bit inconsistent, I think—with deference to you, too, sir—in saying in your brief that the stock and asset acquisitions are one and the same thing, have a unity, and then saying, as you did a few minutes ago, that the determination of that issue under the Clayton Act by this Court is not going to be binding upon the F. P. C. because it is a different thing now to apply to them for an asset combination.

If it is true, as you say in your brief, that the asset and the stock acquisitions are one and the same thing, have a fundamental unity, and we are talking about one issue, and

it is the same issue, how can you say this afternoon that, having decided that issue here, that won't have some binding effect upon the F. P. C. in a later proceeding in which you ask a certification for an asset merger?

But be that as it may, you folks chose a route that gave you no immunity under the Clayton Act, and the Antitrust Division of the Department of Justice has now seen fit to move against you for an antitrust violation.

The issues before this Court are the ordinary, usual issues in Clayton Act proceedings, nothing more, nothing less. Those issues cannot be presented to the F. P. C. in any view of the matter, never will be presented to the F. P. C. Different issues may be presented to them. You are now seeking to present different issues to them and you are seeking, with your application to the F. P. C., to divest this Court of jurisdiction to hear a Clayton Act proceeding.

Now, I do not think your authorities go that far. I have looked at those authorities, and they do not seem to me to go that far. There is some broad language. The broadest, I think, is in the quotation from Frankfurter on the first two or three pages of your brief.

If you look at the broad principles of primary jurisdiction and do not put your eye too carefully on the facts in the case in which they are announced, why, there is considerable support for what you say; but when you relate what the court says to the factual issues before it, I do not believe you have handed me a case that is in point.

Now, whichever way this case is decided there is going to be some prejudice to the future proceedings. If I decide, as I am about to do, that the motion should be denied and that the Clayton Act proceeding should go forward, I suppose there may be some prejudice in the result, whether it is res judicata or not, in the F. P. C. On the other hand, if I decide those motions in your favor and you go first to the F. P. C. and the F. P. C. agrees with you, I suppose there will be some prejudice to the Government's position in the Clayton Act proceedings. Either way I think there

is going to be some prejudice to the proceedings, either here or in the F. P. C.

At this juncture all this Court is confronted with is a Clayton Act proceeding, and the Government urges us to get to the trial of it, which the Government is entitled to do. And the trial of it, it doesn't seem to me, is going to involve anything at all that is properly before the F. P. C. or that can be brought before the F. P. C. And because of that fact, I believe this case is distinguishable from your cases that you have referred to.

There isn't any question at all, under the Acts of Congress, that this Court has jurisdiction of Clayton Act proceedings, and I do not see anything in the Acts of Congress, and nothing has been mentioned here, that takes away that jurisdiction in this kind of a situation or in any other.

I would be abdicating my jurisdiction in favor of that of an administrative agency in relation to a question which, admittedly, on all hands, cannot and will not be decided by that administrative agency; and that I will not do.

The motions are denied.

Federal Power Commission's Letter of November 7, 1957

ADDRESS ALL COMMUNICATIONS
TO THE SECRETARY

FEDERAL POWER COMMISSION
WASHINGTON 25

Docket No. G-13019

El Paso Natural Gas Company

Nov. 7, 1957

Paul Kayser, President
El Paso Natural Gas Company
Texas and Stanton Streets
El Paso, Texas

Dear Mr. Kayser:

It is hereby requested that the application of El Paso Natural Gas Company, Docket No. G-13019 be supplemented by the submission, under oath and in conformity with the Commission's Regulations, of the following additional information:

(1) Exhibit S, Schedule 5 (journal entry (1)), indicates net book cost of Pacific Northwest's facilities at May 31, 1957, of $224,055,545.19. In Exhibit L, Schedule 14, Consolidating Balance Sheet as of May 31, 1957, the net plant is shown in the amount of $222,932,314.00, or a reduction of $1,123,231.19. Submit a reconciliation of this difference.

(2) Journal entry No. 3, of Exhibit S, Schedule 5, includes an amount of $744.94 in Account 301, Organization Expenses. Such costs of Pacific Northwest are considered to have no continuing value to El Paso, and should be eliminated by a charge to

earned surplus. Furnish a statement of El Paso's position in this regard.

(3) Included in Exhibit S, Schedule 5, is journal entry charging Account 391, Gas Plant Purchased, for $140,789,513.00, which is stated to include construction work in progress and gas plant held for future use totaling $20,271,501.25, which is also included in journal entry (1) referred to above.

The explanation for entry of $140,789,513.00 is to "record estimated cost of facilities acquired from Pacific Northwest, for which construction will be completed subsequent to May 31, 1957." Information is desired for reason of duplicating the above $20,271,501.25 in this entry and the reason for not including the $120,518,011.75 ($140,789,513.00 — $20,271,501.25) in entries (1) and (3) if it represents work in progress to be acquired as mentioned in entry explanation. In what account is this amount included on books of Pacific if not in Account 100.3?

(4) Submit a schedule showing the interest during construction capitalized by months to May 31, 1957, showing separately actual interest on borrowed funds and the imputed interest on equity funds.

The schedule should also show the base amounts and interest rates for the actual interest costs and base monthly expenditures or proceeds from equity funds and rate used for computing the element of interest on equity funds. The schedule should show the monthly amounts added to construction work in progress and monthly amounts of completed construction eliminated from the interest base each month.

Explanatory information and data are also requested concerning the method of distributing the other overheads to the plant accounts.

(5) Exhibit S, Schedule 2 (page 9), of application indicates $159,107,201.29 as the cost of transmission plant with a related reserve for depreciation of $1,170,272.75 as of May 31, 1957. After eliminating the nondepreciable transmission plant, a total of $152,965,222.50 remains, which when related to the annual depreciation rate of 3.5 percent (appearing in Exhibit O) for an average age of 5 months (shown in Schedule 4 of Exhibit S) a depreciation reserve requirement of about $2,225,644 is indicated. This represents a difference of $1,055,371.25 when compared to the $1,170,272.75 reserve appearing in application as applicable to transmission plant.

An estimated depreciation reserve requirement was also computed for the period January 1 to May 31, 1957, for depreciable transmission plant on the basis of information appearing in Pacific Northwest's 1956 annual report to stockholders. Transmission plant at December 31, 1956, is stated at $136,028,618, exclusive of overheads and land and land rights. The estimated depreciation reserve requirement covering an actual 5-month period is about $1,980,000 or about $800,000 more than the reserve appearing in the application (without considering any accrued depreciation for plant added during the first 5 months of 1957) as being applicable to total depreciable transmission plant.

In view of the above differences in estimated depreciation reserve requirement, submit summary schedules by plant functions showing the computations made in arriving at the total reserve requirements of $2,317,621.56 shown in Exhibit S, Schedule 2, sheet 22.

It would appear from the application that the depreciation reserve requirement was computed on the average of the first 5-month period of 1957, and no depreciation was accrued during the period

that the plant was in service and operating during 1956. The annual report to stockholders by Pacific Northwest for 1956 (page 3) states that construction was performed continuously from July 8, 1955, to the date of the final weld on October 17, 1956. Explain why no part of the plant was considered to have been subject to depreciation during 1956.

(6) Exhibit L, Schedule 18—The heading of this schedule appears to indicate that Pacific Northwest commenced operations January 1, 1957. However, information in 1956 stockholders' report shows that sales actually started in August 1956 and between August and December 31, 1956, sales amounted to 14,493,852 Mcf or $4,095,539.00. Explain this schedule heading, indicate the date that the initial pipeline system was completed and furnish full support for such date.

(7) The accounting Schedule S does not reflect an estimate for acquisition expenses and the proposed accounting for disposition thereof which should be included.

(8) Schedule No. 2, of Exhibit S (sheet 1), original cost of facilities as of May 31, 1957, indicates that $2,619,116.13 is included in Account 302, Franchises and Consents. Submit a detailed tabulation of such costs related to the various applications filed with this Commission and indicating the items that pertain to the various expenditures made by Pacific Northwest in connection with its seeking authority from the Canadian Government and others, to extend its business into Canada, which did not take form.

(9) Statement of the total Mcf of gas produced during 1956. It appears from Schedule 2 of Exhibit S, that the reserve for depletion of $229,457.84, based

on the unit of production method, relates to production for first 5 months of 1957, without giving effect to the gas produced prior thereto.

(10) Particulars concerning El Paso's total cost of acquiring the outstanding common stock of Pacific as of May 31, 1957, together with a stock list of Pacific Northwest showing the names of all past stockholders and total number of shares owned where such holdings represent 100 shares or more prior to stock acquisition date by El Paso.

It should be indicated on such list, those who were or are officers, directors, or other officials and employees of Pacific Northwest and/or of Fish Northwest Constructors, Inc., Fish Engineering Corporation, and Fish Service and Management Corporation.

(11) A tabulation showing the total amounts by years of the charges to construction costs of Pacific Northwest for fees and services of Fish Northwest Constructors, Inc., Fish Engineering Corporation, and Fish Service and Management Corporation, together with a narrative statement of the basis of such charges.

(12) Detail of the entries for the consolidating adjustments as of May 31, 1957, appearing in Exhibit L, Schedule 14, including explanations.

(13) Page 16 of the subject application states, "... substantial dollar savings can be effected by the elimination of many expenses. ..." In this connection, submit estimates of such dollar savings and the basis for the estimates.

(14) Exhibit H of the subject application refers to Exhibit 75 in the consolidated proceedings, Docket

Nos. G-11797 and G-12580. Page 2 of Exhibit 75 indicates the reserves dedicated to El Paso as of January 1, 1957 by fields (next to last column) in the San Juan Basin. Furnish estimates of total recoverable reserves for each of the fields by reservoirs listed on Exhibit No. 75.

(15) Exhibit H in the subject docket makes reference to the proceedings involving Pacific Northwest, Docket No. G-10455 for information concerning the gas supplies available to that company. Reconcile any differences between total field and reservoir estimates of recoverable reserves submitted in reply to (14) above with total field and reservoir estimates of recoverable reserves of Pacific Northwest in the Docket No. G-10455 proceedings.

By direction of the Commission.

/s/ J. H. GUTRIDE
Secretary

cc: Mr. George D. Horning, Jr.
Colorado Building
Washington, D. C.

APPENDIX B

Statutes Involved

NATURAL GAS ACT, 52 STAT. 821, as amended,* 15 U. S. C. §§ 717-717w

The pending proceedings before the Federal Power Commission were instituted under Section 7 of the Natural Gas Act, which provides in pertinent part as follows:

> "(b) [52 STAT. 824; 15 U. S. C. § 717f(b)] No natural-gas company shall abandon all or any portion of its facilities subject to the jurisdiction of the Commission, or any service rendered by means of such facilities, without the permission and approval of the Commission first had and obtained, after due hearing, and a finding by the Commission that the available supply of natural gas is depleted to the extent that the continuance of service is unwarranted, or that the present or future public convenience or necessity permit such abandonment.
>
> "(c) [as amended, 56 STAT. 83; 15 U. S. C. § 717f(c)] No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations. . . .
>
> ". . . [T]he Commission shall set the matter for hearing and shall give such reasonable notice of the hearing thereon to all interested persons as in its judgment may be necessary under rules and regulations

---

* Amendments to the Natural Gas Act were made by 56 STAT. 83-84, 61 STAT. 459 and 68 STAT. 36.

to be prescribed by the Commission; and the application shall be decided in accordance with the procedure provided in subsection (e) of this section and such certificate shall be issued or denied accordingly. . . .

". . . .

"(e) [as added, 56 STAT. 84; 15 U. S. C. § 717f(e)] . . . [A] certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operation, sale, service, construction, extension, or acquisition covered by the application, if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of the Act and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, sale, operation, construction, extension, or acquisition, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied. The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require."

CLAYTON ACT, 38 STAT. 730, as amended,* 15 U. S. C. §§ 12, 13, 14-21, 22-27

The complaint in this action alleges that it is brought by the United States under Section 15 of the Clayton Act for an alleged violation of Section 7 of that Act. The portions of these Sections upon which the respondent apparently seeks to rely are as follows:

"Sec. 7. [as amended, 64 STAT. 1125; 15 U. S. C. § 18] That no corporation engaged in commerce shall

* Amendments to the Clayton Act were made by 39 STAT. 121, 41 STAT. 626, 43 STAT. 939, 45 STAT. 253, 1536, 48 STAT. 1102, 49 STAT. 704, 717, 1526, 52 STAT. 1028, 54 STAT. 1235, 64 STAT. 1125 and 69 STAT. 282.

acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly. . . ."

"Sec. 15. [38 STAT. 736; 15 U. S. C. § 25] That the several district courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this Act, and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations. Such proceedings may be by way of petition setting forth the case and praying that such violation shall be enjoined or otherwise prohibited. When the parties complained of shall have been duly notified of such petition, the court shall proceed, as soon as may be, to the hearing and determination of the case; and pending such petition, and before final decree, the court may at any time make such temporary restraining order or prohibition as shall be deemed just in the premises. Whenever it shall appear to the court before which any such proceeding may be pending that the ends of justice require that other parties should be brought before the court, the court may cause them to be summoned, whether they reside in the district in which the court is held or not, and subpoenas to that end may be served in any district by the marshal thereof."

The effect upon the application of Section 7 of the Clayton Act of Federal Power Commission approval of a transaction is governed by the last paragraph of that Section, which provides as follows: "

"Sec. 7. [as amended, 64 STAT. 1125; 15 U. S. C. § 18]

". . . .

"Nothing contained in this section shall apply to transactions duly consummated pursuant to authority given by the Civil Aeronautics Board, Federal Communications Commission, Federal Power Commission, Interstate Commerce Commission, the Securities and Exchange Commission in the exercise of its jurisdiction under section 10 of the Public Utility Holding Company Act of 1935, the United States Maritime Commission, or the Secretary of Agriculture under any statutory provision vesting such power in such Commission, Secretary, or Board."

Office - Supreme Court, U.S.
FILED
DEC 30 1957
JOHN T. FEY, Clerk

No. 365 Miscellaneous

IN THE

Supreme Court of the United States

October Term, 1957

El Paso Natural Gas Company and
Pacific Northwest Pipeline Corporation,

Petitioners,

—against—

United States of America,

Respondent.

REPLY BRIEF IN SUPPORT OF THE PETITION FOR CERTIORARI

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

NO. 365 MISCELLANEOUS

EL PASO NATURAL GAS COMPANY and PACIFIC NORTHWEST PIPELINE CORPORATION,
Petitioners,
against
UNITED STATES OF AMERICA,
Respondent.

REPLY BRIEF IN SUPPORT OF THE PETITION FOR CERTIORARI

The Brief in Opposition effectively confirms the reasons advanced by petitioners why the writ of certiorari should be granted.

1. Respondent agrees (RB 6) that the underlying question in the proceedings before the Federal Power Commission is whether it is in the public interest that there be two independently operated pipeline systems or a single integrated system (accord: Petition 13). Respondent agrees (RB 6) that "[u]nlike the broad standard of 'public convenience and necessity' in Section 7 of the Natural Gas Act, the touchstone of illegality under the Clayton Act is a narrower test" (accord: Petition 16-22).

Having thus recognized that the ultimate question posed by the unification of the two pipeline companies is before

the Commission for determination under the broader and more comprehensive standards of the Natural Gas Act, respondent further agrees (RB 10) that "whatever the district court's decision may be, it cannot oust the Commission of jurisdiction to decide the asset consolidation proceeding" according to those standards (accord: Petition 10-13).

These statements by respondent implicitly recognize the Congressional determination that the specific statutory scheme regulating the natural gas industry in detail and providing for an all-embracive test applied by an expert tribunal shall have primacy over the narrow test of the Clayton Act, which by its own terms has limited application to a regulated industry.

The error in the formalistic effort by respondent to treat the question at issue in the lawsuit as legally independent of the Commission proceedings, discussed at pages 13-16 of the Petition, is further reflected in respondent's inconsistent argument, on the one hand (RB 8), that "the Power Commission has no jurisdiction to pass on the transaction challenged in the Clayton Act case", while obliged to concede, on the other (RB 10), that the question of whether "petitioners have violated the Clayton Act through the stock acquisition . . . would be a factor for the Federal Power Commission to consider in determining whether the asset consolidation is required by the public convenience and necessity" (accord: Petition 20).

2. Respondent states (RB 10) that the proceedings before the District Court and before the Federal Power Commission are to be tried "under different standards", and then, entirely overlooking the public interest involved, asserts that this is only an "inconvenience" to petitioners (RB 11) and does not warrant immediate intervention by this Court.

The considerations necessitating immediate review here, however, are precisely the same as those present in *Far East Conference* v. *United States,* 342 U. S. 570, and *United States Alkali Export Association, Inc.* v. *United States,* 325 U. S. 196. The compelling reason for granting certiorari is the potential "frustration of the functions which Congress has directed the Commission to perform and of the policy which Congress presumably sought to effectuate by that performance." (325 U. S. at 204.)

Respondent supports its contention that only "convenience" is at stake with the assertion (RB 10) that the Commission's approval of the proposed acquisition of assets "could not oust the district court of its jurisdiction to decide the Clayton Act case".

Respondent thereby ignores the explicit exemption provision of Section 7 of the Clayton Act itself for acquisitions approved by the Federal Power Commission. Respondent further disregards the fact that the acquisition by merger of the facilities of Pacific Northwest, immunized by the Commission's approval, would constitute the ultimate and fullest degree of unification of the two companies, during which the stock of Pacific Northwest would disappear. See *Alleghany Corp.* v. *Breswick & Co.,* 353 U. S. 151, 170.

The Petition at pages 31 to 33 focuses upon the importance of an immediate resolution of the jurisdictional question posed by the competing proceedings before either tribunal has acted. We note that the unseemly race of diligence, which as we pointed out in the Petition (p. 32) the competing proceedings invite, already has commenced, as reflected in the urgency recently evidenced by the District Court to make a rapid determination of the Clayton Act suit.

The District Judge on December 20, 1957, in a proceeding in which defendants were not involved and without notice, and without the presence of defendants' New York or Houston counsel, peremptorily fixed the trial date for March 3, 1958, and ordered completion of all production of documents by February 3, 1958.

Respectfully submitted,

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December 30, 1957.

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FILED
DEC 27 1957
JOHN T. FEY, Clerk

No. 365, Misc.

In the Supreme Court of the United States

OCTOBER TERM, 1957

EL PASO NATURAL GAS COMPANY AND PACIFIC NORTHWEST PIPELINE CORPORATION, PETITIONERS

v.

UNITED STATES OF AMERICA

ON MOTION FOR LEAVE TO FILE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

BRIEF FOR THE UNITED STATES IN OPPOSITION

J. LEE RANKIN,
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VICTOR R. HANSEN,
Assistant Attorney General,
DANIEL M. FRIEDMAN,
ERNEST L. FOLK, III,
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Department of Justice, Washington 25, D. C.

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CITATIONS

Cases:

Alleghany Corp. v. *Breswick & Co.*, 353 U. S. 151 — 6

Arrow-Hart & Hegeman Elec. Co. v. *Federal Trade Commission*, 291 U. S. 587 — 7

Ex parte Fahey, 332 U. S. 258 — 9

Far East Conference v. *United States*, 342 U. S. 570 — 5

Georgia v. *Pa. R. Co.*, 324 U. S. 439 — 5, 7

Montana-Dakota Utilities Co. v. *Northwestern Public Service Co.*, 341 U. S. 246 — 5

Parr v. *United States*, 351 U. S. 513 — 11

United States v. *Borden Co.*, 308 U. S. 188 — 9

United States v. *Western Pac. R. Co.*, 352 U. S. 59 — 5, 8

United States Alkali Ass'n v. *United States*, 325 U. S. 196 — 9

United States Navigation Co. v. *Cunard S. S. Co.*, 284 U. S. 474 — 8, 9

Statutes:

All Writs Act, 62 Stat. 944, 28 U. S. C. 1651(a) — 9

Clayton Act, 38 Stat. 730, as amended, 15 U. S. C. 12, *et seq.*

Section 7 — 3, 6, 12

Section 11 — 9

Natural Gas Act, 52 Stat. 821, 15 U. S. C. 717f, *et seq.*

Section 7 — 3, 5, 6, 12

Section 20 (a) — 9

Shipping Act, 1916, 39 Stat. 728, 46 U. S. C. 801, *et seq.* Section 15 — 9

26, 1957.[1] The jurisdiction of this Court is invoked under the All Writs Act, 28 U. S. C. 1651 (a).

QUESTION PRESENTED

In an action under Section 7 of the Clayton Act, the United States charged that the acquisition by one natural gas pipeline company of substantially all the stock of a competing pipeline company may substantially lessen competition or tend to create a monopoly. Subsequently, the acquiring pipeline company petitioned the Federal Power Commission for authority to acquire the pipeline facilities of the other company. The district court refused to dismiss the Clayton Act proceedings, or, alternatively, to stay such proceedings pending determination of the Power Commission applications. The following question is presented:

Whether the district court acted within its powers in declining to dismiss or stay its proceedings on the stock acquisition pending Commission determination of the proposed asset acquisition.

STATUTES INVOLVED

The pertinent portions of the Clayton Act, as amended, and of the Natural Gas Act are set forth in the Appendix, *infra*.

STATEMENT

On July 22, 1957, the United States filed a complaint in the district court charging that the recent acquisi-

[1] An application for a stay was filed contemporaneously and was denied by Mr. Justice Whittaker on December 5, 1957, but without prejudice to renewal of the application if the petition for a writ of certiorari should be granted.

tion by El Paso Natural Gas Company ("El Paso") of more than 99% of the stock of Pacific Northwest Pipeline Corporation ("Pacific Northwest") violated Section 7 of the Clayton Act (15 U. S. C. 18). The complaint alleged that the effect of the acquisition, which enabled El Paso to control the interstate transmission and sale of natural gas in eleven far western states, may be substantially to lessen competition or tend to create a monopoly.

Some two weeks later, on August 7, 1957, El Paso and Pacific Northwest filed applications with the Federal Power Commission under Section 7 of the Natural Gas Act (15 U. S. C. 717f) for certificates of public convenience and necessity authorizing El Paso to acquire its subsidiary's pipeline facilities. On September 30, 1957, petitioners moved in the district court to dismiss the complaint on the grounds that the court had no jurisdiction over the subject matter of the action and that the complaint failed to state a claim upon which relief could be granted or, in the alternative, to stay all proceedings pending determination by the Federal Power Commission of their applications. The theory of the motion was that the filing of the applications with the Federal Power Commission gave the latter agency primary jurisdiction to pass upon the issues raised in the Clayton Act suit.

After extensive argument, the court denied the motion from the bench. The court held that the issues in the Clayton Act proceeding (involving the stock acquisition) were not the same as those in the Federal Power Commission proceeding (involving the asset

acquisition); that, under the Natural Gas Act, the Commission had no jurisdiction to decide whether the stock acquisition violated the Clayton Act, or to grant antitrust immunity to such acquisitions; and that, therefore, the "Government doesn't have any remedy in attacking * * * [the] stock transaction except right here in this court" (Tr. 55).[2] Hence, the filing of the applications with the Commission did not oust the court of its jurisdiction to decide the Clayton Act case (Pet. App. A, pp. 2–5). The court pointed out (*id.*, p. 3) that, although petitioners initially could have sought Commission approval of the asset consolidation and, if granted, might thereby have obtained antitrust immunity, they "didn't choose to proceed that way," but instead took "a calculated risk" by acquiring the stock.

ARGUMENT

The district court held that the doctrine of primary jurisdiction was not applicable to this case because (1) the issues before the court and before the Federal Power Commission are not the same, and (2) the Commission has no jurisdiction under the Natural Gas Act either to determine whether the stock acquisition violates the Clayton Act or to grant antitrust immunity to such acquisition. That decision, we submit, is clearly correct, and does not call for the exercise of this Court's extraordinary jurisdiction to review by certiorari an interlocutory order.

1. The doctrine of primary jurisdiction "comes into play" whenever disposition of a claim, "originally

[2] "Tr." refers to the Transcript of argument, October 21, 1957.

cognizable in the courts," "requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body * * *." *United States* v. *Western Pac. R. Co.*, 352 U. S. 59, 64. It reflects the "principle * * * that in cases raising issues of fact not within the conventional experience of judges or cases requiring the exercise of administrative discretion, agencies created by Congress for regulating the subject matter should not be passed over." *Far East Conference* v. *United States*, 342 U. S. 570, 574. The concept necessarily presupposes that the agency has jurisdiction to pass upon the issues that are referred to it; in no case has this Court "ordered reference of an issue which the administrative body would not itself have jurisdiction to determine in a proceeding for that purpose." *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co.*, 341 U. S. 246, 254; cf. *Georgia* v. *Pa. R. Co.*, 324 U. S. 439, 455.

The district court correctly held that the Federal Power Commission "hasn't any jurisdiction to deal with" (Pet. App. A, p. 2; see pp. 3, 4) the question in the Clayton Act proceeding, namely, the legality of the stock acquisition.[3] Petitioners do not contend otherwise. They argue (Pet. 13, 16, 27 (footnote), 30, 32) only that the "essential" or "underlying"

[3] The relevant sections of the Natural Gas Act relate only to the acquisition of natural gas facilities, not the acquisition of stock. Thus, Section 7 (c) (15 U. S. C. 717f (c)) forbids any natural gas company to "acquire" any facilities for "the transportation or sale of natural gas" except upon a certificate of public convenience and necessity "authorizing such acts or operations."

question in the two proceedings is the same, *i. e.*, whether it is "in the public interest of the people of the territories served that there be two independently operated pipeline systems or a single integrated system," and that this question is within the Commission's primary jurisdiction.

While the above question may be the ultimate issue in the asset acquisition proceeding before the Power Commission, it is not the statutory test which the district court is to apply in determining the legality of the stock acquisition under Section 7 of the Clayton Act. Unlike the broad standard of "public convenience and necessity" in Section 7 of the Natural Gas Act,[4] the touchstone of illegality under the Clayton Act is a narrower test: whether the effect of the acquisition may be substantially to lessen competition or to tend to create a monopoly. In other words, the Clayton Act is concerned solely with the effects of an acquisition upon competition, and not the broader issue whether an asset consolidation may appear justified by "public convenience and necessity" despite its anticompetitive aspects.[5]

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[4] That section directs the Commission to approve any asset acquisition which it finds, *inter alia*, "is or will be required by the present or future public convenience and necessity." 15 U. S. C. 717f (e).

[5] Petitioners assert (Pet. 16) that the district court erred in "artificially separating" the stock from the asset acquisition. But it was Congress, and not the district court, which made that separation, by giving the Federal Power Commission jurisdiction over only asset, and not over stock, acquisitions. This distinction presumably reflects the significant practical differences between the two kinds of acquisitions. See *Allegheny Corp.* v. *Breswick & Co.*, 353 U. S. 151, 170;

As the district court pointed out (Pet. App. A, p. 4), the instant case involves only the "ordinary, usual issues in Clayton Act proceedings," which courts customarily adjudicate. Thus, the case neither "rais[es] issues of fact not within the conventional experience of judges" nor "requir[es] the exercise of administrative discretion" (*Far East* case, *supra*). Furthermore, the Power Commission has no jurisdiction to decide (nor, indeed, any special expertise with respect to) the sole question here involved (the legality of the stock acquisition under the standard of Section 7 of the Clayton Act), and the "relief which * * * [the Government] seeks [divestiture of the stock illegally acquired] is not a matter subject to the jurisdiction of the Commission." *Georgia* v. *Pennsylvania R. Co.*, 324 U. S. 439, 455. The Commission has jurisdiction only over the acquisition of pipeline "facilities," whereas the stock acquisition necessarily resulted in El Paso's acquiring control over all the corporate activities of Pacific Northwest. Finally, we point out that the Government's complaint also raises issues with respect to the adverse effect of the stock acquisition upon competition between petitioners in the production and distribution of various oil and gas *products*[6]—a matter not within the Commission's regula-

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Cf. *Arrow-Hart & Hegeman Elec. Co.* v. *Federal trade Commission*, 291 U. S. 587.

[6] Paragraph 14 of the complaint states:

"In addition to the operation of its natural gas pipeline transmission system, defendant Pacific Northwest, directly and through its subsidiaries, is engaged in the exploration for oil, the production and refining of crude oil and the recovery and manufacture of products from natural gas, including natural

tory jurisdiction. The district court, therefore, correctly held that the doctrine of primary jurisdiction is not applicable, and that "the Clayton Act proceeding should go forward" (Pet. App., p. 4).

This case is significantly different from the *Cunard* and *Far East* cases upon which petitioners rely (Pet. 22–30). In those cases, the conduct alleged in the antitrust complaints also violated the Shipping Act of 1916, and the Federal Maritime Board had full authority to deal with such violations under that Act. In the instant case, the Power Commission has no jurisdiction to pass on the transaction challenged in the Clayton Act case (the stock acquisition) and the Natural Gas Act provides no "remedy" therefor which "supersedes the antitrust laws". *United States Navigation Co.* v. *Cunard S. S. Co.*, 284 U. S. 474, 485. Nor are the issues in the Clayton Act case "within the special competence of an administrative body." *United States* v. *Western Pac. R. Co.*, 352 U. S. 59, 64.[7]

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gasoline, butane, propane and other refined and extracted products."

Paragraph 15 (g) lists as one of the effects of the acquisition:

"Actual and potential competition between El Paso and Pacific Northwest in the production and sale of a variety of products of the oil and gas industry, including extracted and refined products of oil and natural gas, will be eliminated."

[7] In the *Western Pacific* case, upon which petitioners also rely, this Court held that questions as to the construction and reasonableness of tariff provisions, at issue in a suit in the Court of Claims, were within the primary jurisdiction of the Interstate Commerce Commission, and that the court therefore should have referred these questions to the Commission. In the instant case, however, the question whether the effect of the stock acquisition may be "substantially to lessen competition

Unlike some other regulatory statutes which provide antitrust immunity for transactions approved by the agency (*e. g.*, Section 15, Shipping Act, 1916, 39 Stat. 728, 733, 46 U. S. C. 814; see *United States Navigation Co.* v. *Cunard S. S. Co.*, 284 U. S. 474, 485), the Natural Gas Act contains no such provision. The only specific reference to the antitrust laws in the Natural Gas Act is the provision in Section 20 (a) (15 U. S. C. 717s) authorizing the Commission to "transmit * * * evidence * * * concerning apparent violations of the Federal antitrust laws to the Attorney General * * *." In short, the Natural Gas Act contemplates that the antitrust laws remain in full force in their application to the natural gas industry. Cf. *United States* v. *Borden Co.*, 308 U. S. 188, 201. Furthermore, although Section 11 of the Clayton Act gives various agencies jurisdiction to enforce that Act with respect to the industries which they regulate, it does not authorize the Federal Power Commission to enforce the Clayton Act against members of the natural gas industry.

2. Although this Court concededly has power under the All Writs statute (28 U. S. C. 1651 (a)) to issue a common-law writ to review an interlocutory order of the character here involved (*United States Alkali Ass'n* v. *United States*, 325 U. S. 196), such writs are "drastic and extraordinary remedies" which are reserved for "really extraordinary causes." *Ex parte Fahey*, 332 U. S. 258, 259–260. Petitioners have not

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or tend to create a monopoly concededly is not within the Power Commission's special jurisdiction. And, as we have pointed out in the text, that is the sole question in the Clayton Act case.

shown any serious, let alone extraordinary, circumstances which justify immediate intervention by this Court at this preliminary stage of the litigation. They point to no legally cognizable injury which they would suffer if the district court case is permitted to follow its normal course.

At the present time, there is no actual or imminent conflict between court and agency; each is adjudicating a different issue under different standards. Indeed, if, as the Government complaint charges, petitioners have violated the Clayton Act through the stock acquisition, that would be a factor for the Federal Power Commission to consider in determining whether the asset consolidation is required by the public convenience and necessity. Although petitioners contend (Pet. 21, 27, 32) that the district court is attempting to "usurp" the Commission's power to decide the public-interest question under the Natural Gas Act, the short answer is that, whatever the district court's decision may be, it cannot oust the Commission of jurisdiction to decide the asset consolidation proceeding—just as a prior decision by the Commission could not oust the district court of its jurisdiction to decide the Clayton Act case. Surely, the district court should not be required to defer deciding an alleged violation of the Clayton Act merely because of the subsequent filing of an application for agency approval of a different, albeit related, transaction—particularly where, as here, the result would be to permit petitioners to retain, perhaps for an extended period, the fruits of what the Government deems to be an illegal stock acquisition.

In short, even if the merits were more doubtful than we think them to be, we do not believe that this would be an appropriate case for this Court to grant a writ of certiorari to review the interlocutory order of the district court. We submit that "the Congressional policy against piecemeal appeals" (*Parr* v. *United States,* 351 U. S. 513, 521) outweighs the consideration upon which petitioners rely—the inconvenience (of their own making) of being involved in two proceedings.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the motion for leave to file the petition for a writ of certiorari should be denied.

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APPENDIX

Section 7 of the Clayton Act, 38 Stat. 730, 731, as amended, 64 Stat. 1125, 15 U. S. C. 18, provides in part as follows:

> No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.
>
> No corporation shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of one or more corporations engaged in commerce, where in any line of commerce in any section of the country, the effect of such acquisition, of such stocks or assets, or of the use of such stock by the voting or granting of proxies or otherwise, may be substantially to lessen competition, or to tend to create a monopoly.
>
> * * * * *
>
> Nothing contained in this section shall apply to transactions duly consummated pursuant to authority given by the Civil Aeronautics Board, Federal Communications Commisison, Federal Power Commission * * *.

Section 7 of the Natural Gas Act, 52 Stat. 824, as amended, 56 Stat. 83, 15 U. S. C. 717f, provides in part as follows:

(a) Whenever the Commission, after notice and opportunity for hearing, finds such action necessary or desirable in the public interest, it may by order direct a natural-gas company to extend or improve its transportation facilities, to establish physical connection of its transportation facilities with the facilities of, and sell natural gas to, any person or municipality engaged or legally authorized to engage in the local distribution of natural or artificial gas to the public, and for such purpose to extend its transportation facilities to communities immediately adjacent to such facilities or to territory served by such natural-gas company, if the Commission finds that no undue burden will be placed upon such natural-gas company thereby: *Provided*, That the Commission shall have no authority to compel the enlargement of transportation facilities for such purposes, or to compel such natural-gas company to establish physical connection or sell natural gas when to do so would impair its ability to render adequate service to its customers.

(b) No natural-gas company shall abandon all or any portion of its facilities subject to the jurisdiction of the Commission, or any service rendered by means of such facilities, without the permission and approval of the Commission first had and obtained, after due hearing, and a finding by the Commission that the available supply of natural gas is depleted to the extent that the continuance of service is unwarranted, or that the present or future public convenience or necessity permit such abandonment.

(c) No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or exten-

sion of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations.

* * * * *

(e) Except in the cases governed by the provisos contained in subsection (c) of this section, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operation, sale, service, construction, extension, or acquisition covered by the application, if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of the Act and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, sale, operation, construction, extension, or acquisition, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied. The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require.

* * * * *